



# **Case Law Update Defense Employee and Labor Relations Symposium**

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# Labor Relations

- ◆ *NTEU and Customs Service*, 64 FLRA No. 22, 109 LRP 63367 (FLRA 09/30/09)  
On remand from the DC Circuit. Authority held that covered by doctrine is not a unilateral right conferred by the statute; parties can negotiate limits of covered by doctrine
- ◆ *AFGE Local 1547 and United States Department of the Air Force Luke AFB, AZ*, 64 FLRA No. 118, (FLRA 08/07/10) Union proposals to allow BUEs to shop at commissary and BX held negotiable, while proposal to allow dependents of BUEs to accompany employee, but not purchase items in commissary or BX, not negotiable
- ◆ *National Weather Service Employees Organization and National Weather Service, Alaska Region*, 64 FLRA No. 98, 110 LRP 16653, (FLRA 03/16/10) Case remanded from DC Circuit, the Authority to determine whether the proposal would significantly hamper the ability of the agency to get its job done. Once it determined that the proposal to add positions to the Anchorage office would not hamper the agency, it held that the proposal was negotiable

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# Labor Relations

- ◆ *National Air Traffic Controllers Association and United States Department of Transportation Federal Aviation Administration, 64 FLRA No. 23 (FLRA 09/30/09)*  
Proposal that “employees covered by the Agreement shall not have their reassignment unreasonably delayed pending employee records/files (medical, security, OPF/EPF, or other DOT/FAA files) review and/or transfer” held negotiable
- ◆ *AFGE Local 171 Council of Prison Locals 33 and United States Department of Justice Federal Bureau of Prisons Federal Correctional Institution El Reno, 64 FLRA No. 41 (FLRA 11/30/09)* Proposal for union representation at search of employee’s personal property where there is a reasonable expectation of privacy and there is reasonable suspicion, absent overriding exigency held negotiable
- ◆ *NTEU and United States Department of Homeland Security Bureau of Customs and Border Protection Washington, D.C. 64 FLRA No. 63 (FLRA 01/15/10)* Proposal concerning grooming standards covering beards and facial hair held negotiable

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# Labor Relations

- ◆ *PASS and United States Department of Transportation Federal Aviation Administration, 64 FLRA No. 77 (FLRA 01/29/10)* Proposals that FAA shall certify dependent children of BUEs assigned to facilities OCONUS and future BUEs assigned OCONUS under certain conditions as eligible to attend DODDS held negotiable
- ◆ *PASS and United States Department of Transportation Federal Aviation Administration, 64 FLRA No. 79 (FLRA 02/04/10)* Proposal "[t]he entitlement for dependent education applies to all FAA dependent children of BUEs attaining school age. The options and rights set forth shall not be limited whether they previously attended a DoD school, and/or other educational institutions, but rather on the eligibility to attend school" held negotiable

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# Labor Relations

- ◆ *IRS Small Business/Self Employed Business Division and NTEU Chapter 78, 63 FLRA NO. 160, 109 LRP 48637 (FLRA 07/31/09) IRS Agency-wide Shared Services and NTEU Chapter 73, 63 FLRA No. 161, 109 LRP 48639 (FLRA 07/30/09) Cases involved details of employees to higher-graded positions. Authority upheld Arbitrator's remedy of multiple retroactive temporary 120-day promotions with 12 months separating each promotion*
- ◆ *355th MSG/CC, Davis-Monthan Air Force Base and AFGE Local 2924, 64 FLRA No. 14, 109 LRP 61687 (FLRA 09/28/09) Giving an employee new work assignment changed his conditions of employment*
- ◆ *United States Department of the Air Force Aerospace Maintenance and Regeneration Center Davis-Monthan AFB, AZ and AFGE Local 2924, 64 FLRA No. 57 (FLRA 12/31/09) Held ULP committed by the agency when it repudiated the drug testing negotiated agreement*

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# Labor Relations

- ◆ *Department of Agriculture, Forest Service, Albuquerque Service Center, Human Capital Management, Albuquerque, N.M. and NFFE, IAMAW, 64 FLRA No. 31, 109 LRP71552 (FLRA 10/30/09) HR Specialists may be included in bargaining units*
- ◆ *AFGE Local 3937 and Social Security Administration, Baltimore and Social Security Administration, Seattle Region, Seattle, 64 FLRA No. 5, 109 LRP 55324 (FLRA 08/31/09) insisting on negotiating permissive matters to impasse is a violation of the statute*

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# Employee Relations

- ◆ *Erickson v. U.S Postal Service*, 571 F.3d 1364, 109 LRP 42924 (Fed. Cr. 07/15/09) employee was absent due to military service, USPS terminated employee for excessive absence due to military leave. Ct held removing employee due to absence due to military service violates USERRA and remanded the case to MSPB
- ◆ *Erickson v. United States Postal Service*, 113 MSPR 41, 2010 MSPB 4, (MSPB 2010) decision on remand discussed abandonment of position and held that employee's actions indicated he had abandoned his position
- ◆ *Kirkendall v. Department of the Army*, 573 F.3d 1318, 109 LRP 45277 (Fed. Cir. 07/27/09) Agency found applicant was not qualified because it did not take into consideration the military documents in the applicant's package. Court held failure to credit applicant with experience as set forth in military documents violates VEOA

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# Employee Relations

- ◆ *Crumpler v. Department of Defense*, 112 MSPR 636, 2009 MSPB 224, 109 LRP 69440 (MSPB 11/02/09) Board held *Egan* standard is appropriate for reviewing cases of removal from "sensitive" positions
- ◆ *Silva v. Department of Homeland Security*, 112 MSPR 362, 2009 MSPB 189, 109 LRP 59680 (MSPB 09/23/09) Agency may be liable under USERRA for contractor employees if agency exercises requisite control over the employment
- ◆ *Valdez v. Department of the Navy*, 2010 U.S. App LEXIS 5598, (Fed Cir. 2010) Unpub. Court upheld removal of Navy employee for unauthorized access of NCIS database
- ◆ *Anderson v. United States*, 2010 U.S. App. LEXIS 2580, (5<sup>th</sup> Cir. 2010) Unpub. Supervisor's case against subordinate for defamation allowed to proceed

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# Employee Relations

- ◆ *Knight v. Merit Systems Protection Board*, 2009 U.S. App. LEXIS 25464, (Fed. Cir. 2009) Unpub. Employee received Notice of Proposed Removal for Unacceptable Performance and a subsequent notice of denial of WIGI. She appealed to MSPB, but did not request reconsideration of WIGI denial. Court upheld MSPB determination that there was no jurisdiction for WIGI denial
- ◆ *Ramos v. Merit Systems Protection Board*, 351 Fed. Appx. 435, 2009 U.S. App. LEXIS 24378, (Fed. Cir. 2009) Unpub. Employee in Federal Career Intern Program was removed after 16 months in program. Federal Circuit upheld MSPB determination it did not have jurisdiction over removal during probationary period
- ◆ *Cunningham v. United States Postal Service*, 112 MSPR 457, 2009 MSPB 200, (MSPB 2009). MSPB held that it is abuse of discretion to remove employee for violating "zero tolerance" policy on violence in workplace without reviewing penalty using the *Douglas* factors

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# Employee Relations

- ◆ *Smart v. Merit Systems Protection Board*, 342 Fed. Appx. 595, 2009 U.S. App. LEXIS 15233, (Fed. Cir. 2009) Unpub. Federal Circuit upheld MSPB's dismissal of case of employee who claimed he was forced to retire when notified of his indefinite suspension
- ◆ *Frazier v. Napolitano*, 626 F. Supp. 2d 618, ( E. Dist. LA 2009) Court upheld MSPB decision on removal of employee for AWOL who was incarcerated for several months, but who was acquitted at trial
- ◆ *Malloy v. United States Postal Service*, 578 F.3d. 1351, (Fed. Cir. 8/25/09) *Pro se* appellant entitled to have mental impairment considered in mitigation in removal action.
- ◆ *Palumbo, Jr. v. Department of the Interior*, 2009 MSPB 171 (August 28, 2009) USERRA case Employee established MSPB jurisdiction by claiming he was veteran who was denied employment and a nonvet was hired. He is entitled to a hearing.

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# Employee Relations

- ◆ *Doe v. Department of Justice*, 2010 MSPB 16, (MSPB 01/15/10) on remand from U.S. Court of Appeals for the Federal Circuit, 565 F.3d 1375, No. 2008-3139, May 11, 2009. FBI removed employee for off-duty misconduct (secretly videotaping sexual relations with 3 women, 2 were FBI employees) Fed Cir remanded for MSPB to set standard “as to when private misconduct that is not criminal rises to level of misconduct that adversely affects the efficiency of the service.” Board held that the agency must prove nexus between “employee’s misconduct and the work of the agency, i.e., the agency’s performance of its functions.”

## EEO

- ◆ *Lombardino v. Vilsack, Department of Agriculture, Farm Service Agency*, 109 LRP 76438, Appeal No. 0720070007, Hearing No. 100-2003-07183X (EEOC OFO 11/27/09) Retaliation found when employee dubbed “troublemaker” and “frequent filer” not selected for position
- ◆ *Newbold-Reese v. Shinseki, Department of Veteran’s Affairs*, Appeal No. 0120073324109 LRP 74337 (EEOC OFO 11/17/09) Retaliation claim failed even after adverse inference taken when agency did not maintain required documentation; selectee was clearly superior for position
- ◆ *Hamblin v. Holder, Department of Justice, Federal Bureau of Investigation*, Appeal No. 0720070041 Hearing No. 260-2005-00174X, 109 LRP 57418 (EEOC OFO 09/03/09) Termination of complainant’s schedule that accommodated disability and then taking action on poor performance that resulted from difficulties due to new schedule was disability discrimination

# EEO

- ◆ *Betz v. Chertoff, Department of Homeland Security*, 578 R.3d 929, 109 LRP 54096 (8th Cir. 08/28/09) Being overworked and underpaid does not rise to level of intolerable working conditions so that employee made a successful claim of constructive discharge
- ◆ *Kraus v. Presidio Trust Facilities Division/Residential Management Branch*, 572 F. 3d 1039 (9th Cir 2009). Timely contact with anyone affiliated with EEO office is sufficient contact even if not an EEO counselor
- ◆ *Gray v. Salazar, Department of the Interior*, EEOC Appeal No. 0120072136 (EEOC OFO 2009). Employee who prevailed on sexual harassment claim awarded \$100,000 in compensatory damages and full amount of pecuniary damages of almost \$50,000 even though she prevailed on 1 of 4 allegations. She was able to show the pecuniary damages were directly related to successful sexual harassment claim

## EEO

- ◆ *Smith v. Principi, Department of Veterans Affairs*, 341 Fed. Appx. 34, 2009 U.S. App. LEXIS 17576, 2009 WL 2407192 (5th Cir. 2009) Court allowed *pro se* appellant's suit to proceed because of more lenient standard review of pleadings when appellant not represented by an attorney and even though he had cashed check for monetary damages
- ◆ *Lee v. Potter*, 2009 U. S. App. LEXIS 27570, (9th Cir. 2009) Employee received lateral reassignment from a secretary position to a supervisory position. The employee requested the reassignment be reversed but the postal service declined. She claimed failure to terminate reassignment was retaliation. Ninth Circuit upheld lower court's summary judgment because failure to reassign to secretary position not an adverse action
- ◆ *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2342, 174 L. Ed. 119, (2009) Mixed motive instruction is not appropriate in ADEA case.

# EEO

- ◆ *Alford v. Winter, Department of the Navy*, EEOC Appeal No. 0120080747, Hearing No. 551-2006-00171X (EEOC OFO 2009) Employee was a bus driver with neck and shoulder problems that caused him to not be able to drive when wearing a shoulder belt. The Base commander required all drivers to wear shoulder belts while driving on base. The employee submitted doctor's note asking that employee be excused from should belt requirement. When request was denied he was unable to continue bus driving duties. He filed disability discrimination complaint. EEOC held inability to wear seat belt made him unqualified for bus driver position